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In the Supreme Court of the United States

OCTOBER TERM, 1984

YOUNG BROTHERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JOHN J. POWERS, III
GEORGE EDELSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether, in the circumstances of this case, the district court's refusal to permit petitioner to introduce into evidence the prior grand jury testimony of two witnesses who refused to testify at trial was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-1 to 1-18) as amended (Pet. App. 6-2) is reported at 728 F.2d 682.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1984. A petition for rehearing was denied on May 21, 1984 (Pet. App. 6-1 to 6-2). The petition for a writ of certiorari was filed on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 804 of the Federal Rules of Evidence provides, in pertinent part:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> **(1) Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

In an indictment filed in the United States District Court for the Western District of Texas in November 1981, petitioner Young Brothers, Inc., petitioner's vice-president, John W. Miller, and Brannon Contractors, Inc., were charged with one count of conspiracy to rig bids for a road resurfacing project in Gillespie County, Texas, in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and two counts of related mail fraud (18 U.S.C. 1341) (Pet. App. 1-4). Petitioner's president, Francis M. Young, was separately indicted for the identical offenses in March 1982 (*id.* at 1-5).

The two indictments were consolidated and tried to a jury in November 1982.[1] The jury acquitted both Miller and Young but convicted petitioner on all counts. Petitioner was fined $750,000 for the Sherman Act offense and $1,000 for each of the two mail fraud offenses.

1. Petitioner does not challenge the sufficiency of the evidence presented against it at trial. Briefly, the evidence established that W.J. Brannon, Sr. of Brannon Contractors contacted potential bidders for the Gillespie County job prior to the letting and persuaded those companies that

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[1]Prior to trial, Brannon Contractors was convicted pursuant to its plea of guilty to the Sherman Act count, and was fined $150,000. In accordance with the plea agreement, the district court dismissed the mail fraud counts against Brannon. As part of the agreement, the company also paid the State of Texas $500,000.

expressed interest in the project to submit "complementary bids."[2] He then contacted Miller, informed him that he "had everyone off the job" and asked Miller not to submit a competitive bid. Because Miller had been instructed by Young to submit a competitive bid, Brannon negotiated directly with Young by telephone. Young told Brannon that he (Young) "needed to make some money" and would refrain from submitting a competitive bid in exchange for $10,000.[3] Brannon agreed to pay Young $10,000 plus some "odd dollars" not to bid the job competitively and told Young to bill him for "rental equipment." Prior to the bidletting, Brannon's son gave Miller the figures he needed to turn in a complementary bid. Pet. App. 1-3 to 1-4.

Pursuant to the scheme, Brannon Contractors submitted the lowest bid and was awarded the contract, earning a profit of $135,000. After the bidletting, Brannon's son instructed petitioner's controller to send Brannon an invoice for $10,001 for equipment rental. When it received the invoice, Brannon Contractors sent a check for $10,001 to petitioner even though Brannon had not rented the equipment described in the invoice from petitioner. Petitioner deposited the check in its bank. Pet. App. 1-4.

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[2]A "complementary bid" is an intentionally high bid submitted pursuant to a collusive agreement between at least two bidders. The purpose of a complementary bid is to deceive the bidding authority into believing that it is receiving competitive bids. Pet. App. 1-3.

[3]Petitioner's interest in the Gillespie County job was based on a prior agreement with Gold Paving Aggregate, Inc. Gold wanted the job but was not qualified to bid on it under Texas Highway Department regulations. Petitioner agreed to submit a bid for the job and, if the bid was successful, to subcontract the work to Gold. Pet. App. 1-2. However, the bid eventually submitted by petitioner was more than $50,000 above Gold's original estimate (*id.* at 1-3).

Petitioner did not present any evidence contradicting Brannon's testimony concerning his agreement with Miller and Young.[4] Rather, its defense was that Miller and Young had only pretended to agree and therefore lacked the requisite intent to violate the Sherman Act. Pet. App. 1-5. It also attempted to call as witnesses Keith Keller and James Kemp of the Allen Keller Company who, in their grand jury testimony, had denied that they discussed rigging bids on the Gillespie County job with Brannon. When these witnesses indicated that, if called to testify, they would invoke their Fifth Amendment privilege against self-incrimination, petitioner attempted to introduce their grand jury testimony as former testimony pursuant to Fed. R. Evid. 804(b)(1). Pet. App. 1-11. The district court sustained the government's objection to the introduction of the grand jury transcripts (Tr. 1128-1129).

2. The court of appeals unanimously affirmed petitioner's conviction (Pet. App. 1-1 to 1-18). With respect to the district court's exclusion of the transcripts of Keller's and Kemp's grand jury testimony, the court of appeals expressly declined to decide whether such grand jury testimony was admissible pursuant to Rule 804(b)(1). Rather, the court held that even if the testimony were admissible, any error in excluding it was harmless because "the evidence undisputedly showed that notwithstanding any participation or nonparticipation by Kemp and Keller, [petitioner] made an agreement with Brannon to submit a noncompetitive bid and in return received $10,001." Pet. App. 1-14.

ARGUMENT

The decision of the court of appeals on the fact-bound harmless error issue is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

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[4]Miller and Young did not testify at trial (Pet. App. 1-3 n.4).

Petitioner contends (Pet. 9-10) that its due process rights were violated because the court of appeals' finding of harmless error was based on a fact not of record — viz., that the jury was aware of a government stipulation that Keller and Kemp had appeared before the grand jury and had denied any knowledge of bidrigging. Although the court of appeals' initial opinion mistakenly stated that the jury was aware of the stipulation (see Pet. App. 1-14), the court corrected this misstatement in its opinion after both petitioner and the government informed the court of its error (see Pet. App. 6-2). As corrected, the court's opinion merely refers to the stipulation but does not assert that the jury was aware of it (*ibid.*). Moreover, the court of appeals' corrected opinion, like its initial opinion, makes clear that the finding of harmless error was based on Brannon's undisputed testimony concerning his illegal agreement with Miller and Young and the payment of $10,001 in exchange for petitioner's noncompetitive bid. Thus, the court's factually correct reference to the stipulation could not have denied petitioner due process.

Petitioner also argues (Pet. 10-11) that the court of appeals "failed to identify which standard of harmless error" it applied. But petitioner does not state what standard of harmless error it believes the court of appeals should have applied, nor does petitioner even assert that its conviction would have to be reversed if the court had applied whatever standard petitioner believes is correct. Moreover, the evidence of petitioner's guilt was essentially undisputed and overwhelming. Thus, under any harmless error standard the exclusion of the grand jury testimony at issue in this case was harmless. See generally *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).[5] Because the court of appeals

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[5]Any agreement to rig bids is a per se violation of the Sherman Act. *United States* v. *Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977). In this case, Brannon's testimony about his bidrigging agreement with petitioner is

was correct in its finding of harmless error, there is no occasion for this Court to consider petitioner's additional contention (Pet. 11-15) — on which the court of appeals did not rule — that the grand jury testimony of Keller and Kemp was "former testimony" within the meaning of Fed. R. Evid. 804(b)(1), and therefore should have been admitted into evidence.[6]

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undisputed and, by itself, sufficient to sustain petitioner's conviction. The grand jury testimony of Keller and Kemp did not involve Brannon's agreement with petitioner. Rather, they simply denied that they had agreed with Brannon to rig bids. Such testimony does not exculpate petitioner and petitioner has never explained how the fact that another firm bid competitively for the Gillespie County job substantiates its defense that it merely feigned agreement with Brannon and did not intend to rig bids. The government is certainly not required to prove that the participants in a bidrigging conspiracy agreed to rig bids with all possible bidders. Cf. *United States* v. *Metropolitan Enterprises, Inc.*, 728 F.2d 444, 447-448 (10th Cir. 1984). Petitioner also suggests (Pet. 4 n.2) that it could have used the grand jury testimony to impeach Brannon. But petitioner expressly told the court of appeals that the testimony was not offered for its impeachment value (C.A. Reply Br. 11). In any event, since the grand jury testimony involved only the collateral issue of whether Brannon had conspired with Keller and Kemp, its impeachment value with respect to Brannon's conspiracy with petitioner was limited at best.

[6]In any event, we note that, contrary to petitioner's suggestion (Pet. 11), whether grand jury testimony is admissible against the government under Rule 804(b)(1) does not depend simply on whether it can be classified as "former testimony." Rather, under Rule 804(b)(1), former testimony is inadmissible unless "the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." There are several reasons why government counsel may not wish to develop further the grand jury testimony of a witness who denies any knowledge of illegal activity. For example, government counsel might believe that the evidence the grand jury is seeking is available from other sources, the testimony denying knowledge may be given at an early stage of the investigation before the government has obtained information with which it could effectively challenge the witness, or the broad scope of an investigation may preclude questioning each witness until the government and the grand jury are satisfied that the witness is either telling the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

CHARLES F. RULE
Deputy Assistant Attorney General

JOHN J. POWERS, III
GEORGE EDELSTEIN
Attorneys

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truth or committing perjury. Moreover, grand jury witnesses are not barred from disclosing their testimony. Fed. R. Crim. P. 6(e). Accordingly, government counsel may not wish to reveal to a witness the evidence that the grand jury has already obtained and thus risk that the witness will warn potential defendants of the scope of the grand jury's investigation.

In this case, the government attorney assisting the grand jury in its investigation simply had no reason to develop further the testimony of Keller and Kemp once they denied knowledge of bidrigging. They testified in the early stages of the investigation before the evidence establishing that bids were rigged on the Gillespie County job had been fully developed. And once the grand jury finished hearing the testimony of the approximately 170 witnesses who followed Keller and Kemp, there was no need to recall the latter two witnesses to question their earlier testimony, particularly when that testimony did not undermine the evidence establishing a bidrigging conspiracy between petitioner and Brannon.

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